FILED
OCT 7 1918
JAMES D. MAHER

BRIEF FOR APPELLEES.

Supreme Court of the United States
October Term, 1918

No. 386

CLARENCE C. CALDWELL, AS ATTORNEY GENERAL FOR THE STATE OF SOUTH DAKOTA, AND EX-OFFICIO MEMBER OF THE STATE SECURITIES COMMISSION OF THE STATE OF SOUTH DAKOTA, ET AL., APPELLANTS,

vs.

THE SIOUX FALLS STOCK YARDS COMPANY, WILLIAM AND HARRY MORLEY, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

No. 2514

GEORGE J. DANFORTH,
HUGH S. GAMBLE,
FRANK McLAUGHLIN,
Attorneys for Appellees.

Edward E. Wagner
Of Counsel

INDEX.

Page

Statement of the Case 1

Argument—

Re The Act Denies to the Appellees Due Process of Law 3

Re The Act is an Unlawful Interference with Interstate Commerce 10

Re The Statute Denies to the Appellees the Equal Protection of the Law 13

Re The Act Attempts to Delegate Both Legislative and Judicial Power to the State Securities Commission, and is not an Inspection Law 14

Re Special Provisions of the Act 17

Re Conclusion 19

Allegeyer vs. Louisiana, 165 U. S. 578 4

Alabama & N. O. Transp. Co. vs. Doyle, 210 Fed. 173 4-5-7

Butchers Union Co. vs. Crescent, 111 U. S. 746 4

Buck Stove Co. vs. Vickers, 226 U. S. 205 4

Bracey vs. Darst, 218 Fed. 482 4

Burke vs. Collins, 18 S. D. 190 4-10

Butler Bros. Shoe Co. vs. U. S. Rubber Co., 156 Fed. 1 9

Barrett vs. Ind., 229 U. S. 26 10

Catlin & Powell vs. Schuppert, 110 N. W. 818 13

Ex Parte Young, 209 U. S. 123 11

Ex Parte Hawley, 22 S. D. 23 4

Greiger-Jones Co. vs. Turner, 230 Fed. 233 8

Hatch vs. Reardon, 204 U. S. 152 4-10-11

Hewitt vs. Board of Medical Examiners, 84 Pac. 39 11

International Text Book Co. vs. Pigg, 217 U. S. 91 15

Lawton vs. Steele, 152 U. S. 133 11-12

Minnesota Rate Case, 230 U. S. 352 4

Mugler vs. Kansas, 123 U. S. 661 4

Mathews vs. Murphy, 63 S. W. 785 8

N. W. Halsey & Co. vs. Merrick, 228 Fed. 805 15

Phoenix Insurance Co. v. Perkins, 101 N. W. 1110 4-10-11-16

Powell vs. Penn, 127 U. S. 678 15

Sioux Falls vs. Kirby, 6 S. D. 62 4

State vs. Burdge, 37 L. R. A. 157 15

Turner vs. Maryland, 107 U. S. 38, 27 Law Edition 370 16

William R. Compton Co. vs. Allen, 216 Fed. 537 16

4-6-10

No. 25143

Supreme Court of the United States

October Term, 1916

No. 860

CLARENCE C. CALDWELL, AS ATTORNEY GENERAL FOR THE STATE OF SOUTH DAKOTA, AND EX-OFFICIO MEMBER OF THE STATE SECURITIES COMMISSION OF THE STATE OF SOUTH DAKOTA, ET AL., APPELLANTS,

vs.

THE SIOUX FALLS STOCK YARDS COMPANY, WILLIAM AND HARRY MORLEY, APPELLEES.

BRIEF FOR APPELLEES

STATEMENT OF THE CASE.

The appellants in this case have correctly stated in their brief the proceedings previously had in this action. We shall, therefore, not enlarge upon their statement, but shall briefly summarize the provisions of the South Dakota Act (Chap. 275, Laws of S. D., 1915), brought in question by this appeal.

A brief summary of the provisions of the Act are as follows:

The title states that it is an Act to prevent fraud in the sale and disposition of stocks, bonds or other securities, and providing for the enforcement thereof and creating a State Securities Commission.

Section 1 of the Act creates a commission and makes the members of the Commission, the Attorney General, Insurance Commissioner and the Public Examiner of the State.

Section 2 makes the Act apply to all persons, co-partnership, corporation, company or association whether domestic or foreign, and if foreign the company is known as a foreign investment company.

Section 3 provides for certain exemptions from the Act, which in substance are as follows: 1. Government and municipal securities. 2. Unsecured commercial papers. 3. Railroad securities. 4. Securities of banks and loan associations, (even though they may have large quantities of

stock and bonds for sale). 5. Mortgages. 6. Increase of stock to stockholders. 7. Securities listed in a standard manual of information if approved by the Commission (the Commission may suspend even the sale of standard securities under this provision temporarily or permanently, so this exemption really amounts to nothing). 8. Isolated transactions.

Section 4 provides in part what information must be furnished to the Commission as follows: 1. Statement in detail of its plan of business. 2. Copies of all contracts, stocks or bonds. 3. Copy of its prospectus. 4. Copy of its proposed advertisements. 5. Name and location of its main offices. 6. Names of its officers. 7. Itemized account of its financial condition. 8. An account of its liabilities and assets. 9. *Such other information as the Commission may require.* 10. If a foreign corporation, it must furnish a copy of the law under which it was incorporated. 11. A copy of its charter. 12. A certificate that it is authorized to do business in a foreign state. 13. Copies of its constitution and by-laws. 14. Amendment to its constitution or by-laws. 15. All papers relating to its organizations.

The Section then provides for a fee ranging from $10 to $100.

Section 5 of the Act requires that all papers sent to the Commission, either be verified by proper officers or certified by public officials.

Secton 6 provides that the applicant must *file its irrevocable consent that suits may be commenced against the applicant by service of summons upon the Public Examiner.*

Section 7 provides for the time of hearing the applications.

Section 8 authorizes the Commission to require further information than the information required in the foregoing sections, and authorizes the Commission to make an appraisal of all the property of the applicant and this appraisal is to be made at the expense of the applicant.

Section 9 authorizes the Commission from such papers, etc., as are required by the Act to find, that the contracts of the applicant are fraudulent *or to find that such papers, contracts and bonds would in its opinion work a fraud on the purchaser.* The Commission is then authorized to deny absolutely the right to sell any stock or bonds, or it may approve the right to sell stock and bonds to *a limited amount,* and give a *permit limiting the amount of stock,* bonds, etc., which may be sold thereunder.

Section 10 defines a dealer in stock.

Section 11 requires a dealer to furnish practically the same information as required of corporations, etc.

Section 12 requires an additional fee for agents who may sell.

Section 13 requires the manner of keeping accounts, and permits applicants after they have a permit to be examined by an examiner *at the expense of the company*, and if the company fails to permit such examination it forfeits its right to sell stock and authorizes the Commission, *without any hearing or other action, after such examination, to absolutely suspend the right to sell stock.*

Section 14 makes it unlawful to use in the sale of stocks and bonds, *any other contracts or circulars than those that have been approved by the Commission.*

Section 15 requires *dealers* to comply with all the provisions of the law, unless the corporation has already complied.

Section 16 gives unlimited discretion in the Commission to advertise the condition of any company.

Section 17 leaves Banks and Insurance Companies under the control of the Public Examiner and Insurance Commissioner.

Section 18 provides for a seal.

Section 19 makes it a misdemeanor to furnish false statements.

Section 20 authorizes the Commission to furnish information to the public upon the person making inquiry paying the cost.

Section 21 requires an annual statement under penalty of forfeiture of all rights to sell stock.

Section 22 authorizes certiorari proceedings.

Section 23 provides for a maximum penalty of a fine of $1,000.00 and one year in jail.

THE ACT DENIES TO THE APPELLEES DUE PROCESS OF LAW.

Section 2 of Article 6 of the Constitution of the State of South Dakota provides: "No person shall be deprived of life, liberty or property without due process of law."

The Fourteenth Amendment of the Constitution of the United States provides:

> "No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

There will be no dispute between counsel for the appellants and counsel for appellees upon the proposition that the appellees cannot be deprived of their property "without due process of law." It will simply be a difference in applying the principle and the facts in this case.

In the case of *Allgeger v. Louisiana*, 165 U. S. 578, this Court stated:

> "The liberty mentioned in that amendment (referring to the Fourteenth Amendment) means not only the right of a citizen to be free from mere physical restriction of his person as by incarceration, but the term is deemed to embrace the right of a citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary or essential to his carrying out to a successful conclusion the purposes above mentioned."

In the case of *Butchers Union Company vs. Crescent*, 111 U. S., 746, this Court further stated:

> "The right to follow any of the common occupations of life is an inalienable right. It was formulated by such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen. I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States."

In *Powell vs. Penn.*, 127 U. S., 678, this Court held; that the acquiring, holding and selling property is an essential part of his rights of liberty and property as guaranteed by the Fourteenth Amendment.

See also *Buck Stove Co. vs. Vickers*, 226 U. S. 205.
Ex Parte Young, 209 U. S. 123.
Minnesota Rate Case, 230 U. S. 352.
Lawton vs. Steele, 152 U. S. 133.
William R. Compton Co. vs. Allen, 216 Fed. 537.
Alabama & N. O. Transp. Co. vs. Doyle, 210 Fed. 173.
Bracey vs. Darst, 218 Fed. 482.
N. W. Halsey & Co. vs. Merrick, 228 Fed. 805.
Greiger-Jones Co. vs. Turner, 230 Fed. 233.

From the expressions of the Courts in the foregoing cases, it is self evident that there can be no justification in

the law in question, unless it comes within some exception to the general rule, and that exception is to be determined by whether or not the law falls within what is termed the "police power" of the State. The learned Attorney General argues that the legislature of the State, has not conferred upon the State Securities Commission strictly judicial functions; that the State Securities Commission is a sort of administrative board vested with discretionary powers to determine questions necessarily incident to its administrative duties. From his own interpretation of the Act as thus stated, he reaches the conclusion that the Act in question does not deprive the appellees of property without due process of law, nor deprive them of equal protection of the laws. His argument is necessarily based in the first instance upon the theory that the sale of stocks and bonds is a subject that comes within the usual inspection statutes which have been held valid under the police power granted to the several states. The primary question is whether the sale of stocks and bonds and other securities is of such a nature as to threaten the public safety, or the lives, health and morals of the inhabitants or the welfare of the community in general.

Is it the welfare of the community that is to be protected by the law in question, or is it the welfare of the comparatively few individuals who buy stocks and bonds that are sought to be protected by the law? If it is not the welfare of the public at large, the law must of necessity fail. The argument of the Attorney General has been answered by all the Judges of the Federal Courts, who have been called upon to pass upon laws similar to the Act in question.

In *Alabama N. O. Transp. Co. vs. Doyle*, supra, the Court discussed this question and stated as follows:

> "It is enough now to remember that the prohibition in question has to do with transactions *predominately private*, and not those which are affected by a public interest which arose from public grant, or which exist by sufferance. This statute does not deal with common carriers, grain elevators or other enterprises of that class, nor distinctly with corporations, nor at all with saloons, itinerant peddlers and the like. The issuing of commercial paper, stocks or bonds by a private company to get money for its own business, no one can suppose is a public or quasi-public enterprise. The business of buying and selling stocks and bonds and other securities is no more 'affected by a public interest' than is the business of buying and selling groceries. When we thus recall that the prohibition applies to a

private business, the question at once presents itself whether frauds and opportunities for fraud, sufficiently characterize the business to justify its entire prohibition, save under drastic restrictions. We cannot shut our eyes to the fact, which all men know, that as compared with the total dealings in securities covered and contingently prohibited by this Act, those which may fairly be suspected to be of a fraudulent character, are a very trifling proportion, and there is no reason to suppose that the percentage of fraud is any greater than in each of the ordinary business and professional occupations.

In *William R. Compton Co. vs. Allen*, supra, the Court stated in referring to a similar law in the State of Iowa:

"It must be held, the subjects of Interstate Commerce therein sought to be regulated and controlled are not only burdened by the Act, but are directly burdened thereby, and that such *articles* (referring to stocks and bonds) *are not the subject of state inspection laws*"

A complete analysis of the provisions of the act in question shows that this is not a law to prevent fraud in the sale of stocks and bonds. It is a law designed and designated for the sole purpose of regulating the control of the sale of stocks and bonds to a point of absolute prohibition. What power or authority is given to the commission to prevent the fraudulent sale of stocks and bonds to purchasers after the permit has been given to the corporation, individual or association? The stocks and bonds that are sold under the permit given by the commission are no more protected against the fraud and deceit of the agent in selling the same to some purchaser than are the sale of stocks and bonds that are sold without a permit. Nowhere in the statute is there any penalty whatsoever for the sale of stocks and bonds by reason of fraud. The law is purely an attempt to regulate profit and loss and to try to guarantee to the citizens of South Dakota a possible mistake in judgment in the purchase of stocks and bonds. It is simply an effort to prevent the citizens of this state from entering into a legitimate enterprise for gain, if they so desire, and to guard their pocketbooks. The law does not provide any penalty for fraud, but simply contains a prohibition against and provides a penalty for tendering for sale an article of commerce, however honestly it may be tendered. Herein lies the vice of the statute, and herein does it differ from all laws regulating commercial transactions, which have been upheld by the court under the guise of police regulations, and an examination of the six indictments against the appellees in this case attached to the bill of complaint, and ap-

pearing in the printed record, show absolutely that the law in question in no shape, manner or form protects citizens against fraudulent practices in the sale of stock. The appellees in none of the cases were charged with having perpetrated any fraud. They were simply charged with having done what has been recognized as lawful for a century or more, and then because they failed to comply with the drastic provisions of the Act, they are prosecuted under the Act, but not prosecuted for fraud.

From an analysis of the law, it is self evident that the State Securities Commission is not merely an administrative board vested with certain discretionary powers, but that it is rather a Court before which evidence must be taken, examined and weighed, and with authority greater than was ever conferred upon any judicial tribunal in this country.

The *very right to make a contract is taken away* from the individual unless the individual or corporation or association receives the stamp of approval of the Commission upon the contract.

Section fourteen of the Act in part provides as follows:

> "It shall be unlawful for any investment company or dealer or its or his agents, to issue, circulate or deliver any advertisements, pamphlets, circulars, prospectus or other document in regard to its stocks, bonds, *contracts* or other securities in the State of South Dakota differing in any way from the copy filed with said Commission as provided by this Act, nor until the same has been approved by the Commission."

Section four of the act shows what information must be furnished the Commission. Sub-division nine of said section authorizes the Commission to obtain any other information that it may require. Section six provides that the applicant must file its irrevocable consent that suits may be commenced against the applicant by service of summons upon the Public Examiner. Section thirteen authorizes the Commission at any time to examine any company or corporation that has already complied with the Act at the expense of the Commission. Other equally drastic provisions appear in the Act.

Can it be said after reading the Act in question, that the said Securities Commission of the State of South Dakota is purely an administrative board? No such power was ever conferred upon any court. As was stated in *Alabama & N. O. Transp. Co. vs. Doyle.*"

> "If a company is organized to make and sell a new invention, and if the Commission thinks the enterprise will not succeed, the stock may not be sold even to skilled bankers who have investigated thoroughly and still do

sire to buy. If through local pride or in the effort to save an existing investment or for any direct benefit, should the citizens of a town wish to take stocks or bonds in the local company, though knowing they are likely to lose their investment, and being willing to take the chance, yet they may not,—this law forbids."

The learned Attorney general argues, "he must be indeed unread and uninformed that has not been impressed with the great development in these later years of the business of selling stock and securities. It is a part of the commercial growth of the country." We readily agree with that statement of the Attorney General, but inquire whether the time has now arrived when what the Attorney General sees fit to call an administrative board is given the power to block this business, which has become a part of the commercial growth of the country, and whether this administrative board can set up its judgment upon investments against the judgment of skilled business men, bankers, brokers and many others who are experts upon investments in such securities, simply because of occasional fraud practiced in the sale of such securities. For a century or more the business of trading in horses has been recognized as a line of business in which fraud was frequently practiced. There would be just as much sense in having the State Securities Commission put its stamp of approval upon every horse trade as there would be to have the State Securities Commission set up its judgment against the skilled investor, simply because an occasional person has lost his money by reason of a stock transaction.

The Supreme Court of the State of South Dakota has answered the argument of the Attorney General in the case of *Ex Parte Hawley*, 22 S. D., 23. In that case the legislature of the State of South Dakota sought to regulate under the guise of police regulations, the sale of nursery stock in this State. In that case the Supreme Court of South Dakota quoted with approval these words from the case of *Mugler vs. Kansas*, 123 U. S., 661:

"The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to

so adjudge, and thereby give effect to the constitution."

The Nursery Law under discussion by the Supreme Court of the State of South Dakota, required those who sought to engage in the sale of nursery stock, to secure a certificate of integrity and responsibility, so as to show the good faith of the applicant before he could secure a permit to engage in the business. When the law in question is analyzed, it is almost identical with the Nursery Law in that the so-called administrative board is in effect obliged to isssue its certificates of integrity and responsibility for those who engage in the business of selling stocks and other securities. We presume from the argument of the Attorney General, that if twenty-six states had passed similar nursery laws, that the law for that reason should have been upheld by the Supreme Court of the State of South Dakota. The South Dakota Court answers the Attorney General's argument in these words:

> "Certainly it cannot confer upon the Board of Agriculture a power which itself does not possess, as was in effect attempted by the provisions authorizing such board in the exercise of an indefinite discretion to refuse permits on the ground of the applicant's want of financial ability. It is true this Court has sustained a statute conferring unlimited authority upon County Commissioners to accept or reject local license bonds, but the decision was placed on the ground that the business of selling intoxicating liquors is not one of natural right, but one which may be restrained or entirely prohibited by the State. *Burke vs. Collins* 18, S. D., 190. Such is not the character of the business here involved. We are now dealing with a business or occupation which in itself is universally recognized as innocent, and useful to the community in which it is conducted, notwithstanding the nature of the articles sold may render detection of fraud and misrepresentation difficult. Doubtless there are dishonest men in the nursery business. There are such men in all lines of business, professions and occupations. All nursery men are not dishonest. The business itself is not harmful. On the contrary, and especially in this State, the production of trees, flowers and all forms of healthful plant life is beneficial and should be encouraged."

What was said by the Supreme Court of the State of South Dakota, applies with full force and effect in this action. The business of buying and selling stocks and bonds, and other securities, is not harmful, in fact it is one of the

things that has promoted "the commercial growth of the country."

In *Grieger-Jones Co. vs. Turner*, and *N. W. Halsey & Co. vs. Merrick*, supra, similar laws were discussed, and all held unconstitutional, and in *Bracey vs. Darst*, supra the Court stated:

> "So far as we know, the states uniformly have criminal statutes against the procurement of money or things of value under misrepresentation, false pretenses and fraud, and the civil right of the victim to recover back the money or property so secured, is universally upheld and enforced."

Can it be said in the face of all these decisions, and in the face of the drastic regulations and burdens imposed by the Act, that this Act does not deprive the appellees of their property and rights of property without due process of law?

THE ACT IS UNLAWFUL INTERFERENCE WITH INTERSTATE COMMERCE.

It is urged in this case by the appellants that no interstate transaction is involved. The Courts, however, have taken an adverse view of the matter, and it is now settled by many decisions that the dealing in stocks and bonds of a foreign corporation, constitutes an interstate transaction.

In the case of *Butler Bros. Shoe Co. vs. U. S. Rubber Co.*, 156 Fed. 1, Judge Sanborn stated:

> "All interstate commerce is not sales of goods, importation into one state from another is the indespensible element. The test of interstate commerce and every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons or information is a transaction of interstate commerce.

In *Bracey vs. Darst*, the West Virginia case hereinbefore cited, the Court stated:

> "We do not think it can be longer questioned that stocks, bonds, debentures and other securities, are subject matters of interstate commerce."

And many cases are cited in the opinion.

In *William R. Compton vs. Allen*, heretofore cited, the Court stated:

> "We have no doubt but that Court (Supreme Court of the United States), when presented with the question, will decree such securities and property rights,

negotiable and otherwise as are sought to be regulated by the Act in question, are proper subjects of interstate commerce."

In *Greiger-Jones Co. vs. Turner*, the Ohio case hereinbefore referred to, the Court stated:

> "Utterances eminating from the Supreme Court, and express rulings by lower Federal Courts, established beyond all reasonable controversy that stocks and bonds whose disposition is subject to the provisions of the Act, are articles of legitimate interstate commerce."

In the case of *N. W. Halsey & Co. vs. Merrick*, the Michigan case already cited, the Court held the law unconstitutional upon the express ground that it constitutes a direct interference with interstate commerce.

In the case of *Catlin & Powell vs. Schuppert*, 110 N. W., 818, the Supreme Court of the State of Wisconsin held that the sale of stocks is a transaction in interstate commerce.

In the case of *Hatch vs. Reardon*, 204 U. S. 152, the Supreme Court stated:

> "A stock certificate is more than evidence—it is a constituent of title."

The learned Attorney General and his able assistant argued that there is no distinction between an insurance policy and a stock certificate. In this the appellants are mistaken for they fail to recognize the fact that when certificates of stock are issued, that they become personal property, and are as much the subject of sale and transfer as any other article of commerce. The whole business world now recognizes that stocks and bonds and securities of a like nature are articles of commerce to be dealt in from day to day, and to hold that they are not articles of commerce within the meaning of the constitution is to run counter to all modern business methods.

In this case, Section 6 of the Act in question requires "every foreign investment company before offering for sale any of its stocks, bonds, investment contracts or other securities in this state shall also file its irrevocable written consent that suits and actions may be commenced against it in the proper court of any county in this state in which a cause of action may arise, or in which the plaintiff may reside, by the service of any process or pleading authorized by the laws of this state on the Public Examiner of the State of South Dakota, etc."

In the case of *International Text Book Co. vs. Pigg*, 217 U. S. 91, the principle involved in this case was decided by the Supreme Court of the United States. That was a case which arose in the State of Kansas under a law which provided that a foreign corporation could not do business in

Kansas until it made application to the State Charter Board for permission to engage in business in that State as a foreign corporation; that it should pay a fee of Twenty-five Dollars, and should file in the office of the Secretary of State its written consent irrevocable, that process against it might be served by being served upon the Secretary of State. The Charter Board was authorized to make special inquiry in regard to the solvency of the corporation, and to determine whether it was properly organized, and whether its capital stock was unimpaired. The law also provided for an annual detailed statement to be delivered to the Secretary of State, and that statement should set forth the capital paid up, the par value, the market value, the statement of its assets, statement of its liabilities, list of its stockholders, the number of shares held by each, the names and post office addresses of the officers and the manner of their election, and if it failed to file such statement, the corporation then forfeited its right to do business in the state.

The provisions of that Act are almost identical with the provisions of the Blue Sky Law of this State so far as it involves one of the principles of this case. The Supreme Court of the United States reached the conclusion absolutely that the law was unconstitutional and interferred with the business of interstate commerce. In that case the dealings of the corporation were almost entirely by mail. We quote the following from the opinion:

> "In the first place it is made a condition precedent to the authority of a corporation of another state, except banking, insurance and railroad corporations to do business in Kansas, that it shall prepare, deliver and file with the secretary of state a detailed statement showing the amount of the authorized, paid up, par and market value of its capital stock, its assets, and liabilities, a list of its stockholders with their respective post office addresses and the shares held and paid for by each, and the names and post office addresses of the officers, trustees, or directors and managers. In the next place the statute denies to the corporation doing business in Kansas the right to maintain an action in a Kansas court unless it shall first obtain a certificate of the Secretary of State to the effect that the statement required by section 1283 has been properly made."

In view of the decision, it appears to us that this question has already been settled by this Court, for the provisions of the South Dakota Statute are almost identical with the provisions of the Kansas Act held unconstitutional

as being an interference with interstate commerce, by this Court.

The very Act herein questioned recognizes the fact that stocks, bonds and securities are subjects of barter and sale. Section Four of the Act provides: "Before selling, offering for sale, taking subscriptions for or negotiating for the sale in any manner whatever in this state, any stocks, bonds, etc.," the sale shall be void unless the Act is complied with. If stocks are not the subject of barter and sale, why prohibit or regulate their barter and sale? If they are the subject of barter and sale, by what possible reasoning can it be made to appear that they are not articles of commerce?

THE STATUTE DENIES TO THE APPELLEES THE EQUAL PROTECTION OF THE LAW.

The statute under consideration exempts state and national banks and loan associations and certain other classes.

In *Barret vs. Ind.*, 229 U. S., 226, the United States Supreme Court stated: "The equal protection of the laws requires laws of like application to all similarly situated. * * * * The legislature is permitted to make a reasonable classification, and before a court can interfere with the exercise of its judgment, it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others who it leaves untouched."

If we apply that doctrine to this case, we then ask, is there a fair reason for the extension of this law to the appellees, while national banks, savings and private banks, loan associations and trust companies, etc., go untouched by its provisions? We would like to know what is the difference between the securities held by the excepted class, and the securities held by other dealers? In fact possibly the great bulk of such securities throughout the country is held by banks as collateral security, and for other purposes. Why should those who are in the excepted class be entirely exempt from the provisions of the Act? Is there any difference of which the Court can take notice which presents a just and natural reason for the distinction made by the law for these privileges? The very fact that those in the excepted class are favored by the law, makes it self evident that the law upon its face has nothing to do with the matter of fraud in the sale of stocks, bonds and other securities. The law is, therefore, discrimatory and denies to the appellees the equal protection of the laws.

It further appears by the bill of complaint and the answer that the appellee, corporation, has complied with

the laws of the State of South Dakota relating to foreign corporations, and the state has authorized it to do business in this state. After it has granted that permit, it then imposes the additional burden of requiring it to comply with all of the provisions of the so-called Blue Sky Law, and in that regard this law denies to the appellee, corporation, the equal protection of the laws of the State of South Dakota.

THE ACT ATTEMPTS TO DELEGATE BOTH LEGISLATIVE AND JUDICIAL POWER TO THE STATE SECURITIES COMMISSION, AND IS NOT AN INSPECTION LAW.

The power given under the various sections of the Act in question make it apparent that the act confers both legislative and judicial power upon the State Securities Commission. Under Section Four of the Act the applicant may be required by the commission "to furnish such other information as the commission may require." What such other information that the Commission may require may be, is left absolutely undetermined.

Section Eight authorizes the Commission to require still further and additional information and appraise the property of the applicant at the applicant's own expense.

Section Nine leaves the question of fraud purely as a matter of the opinion of the Commission and gives the Commission arbitrary power without any standard being fixed to deny the applicant the right to sell stocks and bonds.

Section thirteen requires the applicant, even after a permit has been granted, to sell stock, to keep its or his books in a certain manner and permit an examination of such books at it or his expense, and for failure so to do the right to sell stock is forfeited. Under this section if the Commission does make an examinaton, the arbitrary power is given to suspend absolutely the right to sell stock, even if the permit was given in the first instance.

Section Sixteen also gives the Commission an unlimited discretion to advertise the condition of the company. These and various other sections of the act establish conclusively that there is absolutely *no standard of rules* by which the Commission is to be guided in passing its judgment or in making its findings. It is, therefore, an unlawful delegation of legislative and judiciary power. If a permit is given under the Act, without any standard being fixed, the Commission has power to take away that permit. This statute in many respects is similar to the statute enacted in South Dakota, which attempted to delegate to the Insurance Commissioner of the State, the power to draft "a standard" fire insurance policy when the legislature had failed to fix or provide the provisions to be incorporated in said policy.

The Supreme Court of the State of South Dakota in the case of *Phoenix Insurance Company v. Perkins,* 101 N. W. 1110, held unconstitutional such a law, and stated:

> "It is here that the inherent inefficacy of an attempt to clothe any state officer with power to make or provide an exclusive form of policy becomes apparent. Conditions which the law requires to be in all fire insurance policies, do not express the consent of uninterested parties. They have the force and effect of law, and cannot be abrogated by agreement or rendered nugatory by waiver. The power to prescribe such conditions is legislative."

In the case of *Sioux Falls vs. Kirby,* 6 S. D., 62, the Supreme Court of South Dakota stated in reference to a certain ordinance requiring a permit to build upon one's property:

> "It is clear that the ordinance in controversy upon its face attempts to restrict the right of dominion which every individual possesses over his property, not according to any general or uniform rule, but as to make his absolute enjoyment depend upon the arbitrary will of the city inspector, from whose decision no appeal is given. Such an ordinance cannot be sustained."

In the case of *Hewitt vs. Board of Medical Examiners,* 84 Pac., 39, the California court used these words:

> "No definite standard is furnished by the law under this provision whereby a physician with any safety can advertise his medical business, nor is there any definite rule declared whereby, after such an advertisement is had the Board of Medical Examiners shall be controlled in determining its impropriety, and the provision of the Act, even as to the judgment of the board, furnishes no standard by which that determination shall be arrived at."

In the case of *Mathews vs. Murphy,* 163 S. W., 785, the Act provided that a physician's license might be revoked "for grossly unprofessional conduct of a character likely to deceive or defraud the public." The Act was held unconstitutional because no standard had been prescribed to determine whether any given conduct was or was not unprofessional.

In the case at bar, the law distinctly provides that all that is necessary for the Securities Commission to find is that in its opinion the sale of stocks, bonds, etc., might work fraud upon the purchaser. A pure and absolute discretionary power is given to the commission. First, as to the granting of the permit, and: Second, as to the revocation of the permit after it is granted. There is no standard

fixed to guide the commission in granting the permit, nor is there any standard prescribed as the reason for the revocation of the permit.

See also *Halsey & Co. vs. Merrick*, the Michigan case hereinbefore cited, in which this very question was discussed and decided adversely to the appellants.

The true test in such a case was stated by the Supreme Court of Wisconsin in *State vs. Burdge*, 37 L. R. A., 157, as follows:

> "The true test and distinction whether a power is strictly legislative or whether it is administrative and merely relates to the execution of the statute is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of law. The first cannot be done, to the latter no valid objection can be made."

The learned attorney general and his able assistant by a species of original logic, have discovered that the act in question is simply a harmless inspection law wherein and whereby securities may be inspected by having certain data furnished to the commission. From this data this almost omnipotent commission is then to determine for the experienced banker, broker or investor, whether he ought to invest in certain securities or not. The simple use of the word *inspection* in this connection refutes the argument advanced.

In *Turner vs. Maryland*, 137 U. S. 38,, 27 Law Edition, 370, the Court stated:

> "The object of inspection laws is to improve the quality of *articles produced by the labor of the country*, and fit them for exportation, or it may be for domestic use."

It is indeed a novel syllogism that produces a conclusion that stocks, bonds and securities belong within that well known class of articles produced by the labor of the country for general use or consumption. If we are willing to concede that the public generally eat stocks and bonds, or use them as other food, and like products are used, then we would have to concede that the Attorney General is right, otherwise not.

In this connection it is then urged, that because 26 states have passed somewhat similar laws that there is a crying need for this kind of legislation, and for that reason constitutional government should yield to socialistic tendencies. In South Dakota our legislature has seriously considered the passage of an act regulating the length of ladies hat pins.

Similar bills have been considered by other legislative bodies. By the same logic, the crying need of that character of legislation would become apparent. The appellants overlooked the fact that the approval of the Securities Commission in no manner raises the standard of the security offered for sale as does proper inspection laws. The giving of the permit by the Commission simply gives to the dishonest stock salesman, an addition argument when he "paints in glowing colors the contemplated success of his proposed enterprise," for the dishonest stock salesman then argues that the securities which he is offering for sale have the *approval and the backing of the State*. Instead of preventing fraud, the law has to the writer's own knowledge promoted fraud.

SPECIAL PROVISIONS OF THE ACT.

Under Section Three of the Act, it is provided that the Act does not apply to isolated transactions. This in connection with what we have already stated emphasizes the fact that this is a law not enacted to prevent fraud, and that the title is a misnomer. Under that provision the writer of this brief might well sell to the Attorney General in the State of South Dakota certain stocks and other securities, and practice the most pernicious fraud in such sale, but as long as such sale remained an isolated transaction, the writer could not be prosecuted under the provisions of the Act. The Attorney General might well sell to the writer of this brief and some three or four other individuals within the State of South Dakota, the most valuable securities without practicing any fraud or deception, and the purchasers of such securities might all profit by the investment made. The Attorney General should he make such sales within the jurisdiction of the State of South Dakota, renders himself amenable to the provisions of the law, although he practiced no fraud, and the writer of this brief having practiced a pernicious fraud could go "scot free," under this very law enacted under a title which purports that this is a law to prevent fraud.

This law also exempts securities appearing in a standard manual of information. An examination of that provision reveals the fact that the Commission, however, must approve the manual. What if they do not approve? The absolute discretion is vested, and if approval is granted the Commission can arbitrarily set aside its approval, make an examination and require all the information required in other cases.

Section Eleven of the Act applies to dealers, and requires the dealer to comply with the law, unless the cor-

poration or association has already complied. What is the result of this provision? A stock broker in the State of South Dakota might have in his possession a dozen different kinds of valuable securities which he desired to sell honestly to the citizens of the State of South Dakota. The corporations or associations that had originally issued such securities no longer have any interest in the securities as they belong either to the stock broker or other private individuals. The corporation or association has no interest in complying with the law, and there is no reason why such corporation or association should pay a license fee or furnish the information required. In fact the corporation or association might and undoubtedly would, refuse to submit to an examination. The dealer would then have to comply with the provisions of the law required of the corporation or association for each particular class of stock which he had in his possession before he could enter into the ordinary field of commercial transactions which even the Attorney General recognizes as one of the things that has contributed to the great development and growth in this country in recent years. We would like to inquire how the stock dealer could comply with the law, if the corporation which originally issued the securities refuses to be examined?

Section Thirteen of the Act authorizes the commission to make an examination of an investment company, and authorizes them to charge Ten Dollars a day for each day or fraction thereof that the examiner is absent from the Capitol Building of the State, and also requires the investment company to pay the travelling and hotel expenses of the person making the examination.

The Attorney General argues that the fees are in no manner excessive. If an examiner sent out under this law were to examine some Eastern corporation for some dealer who held a few stocks or bonds for sale in the State of South Dakota, the amount that would be required to be paid would be no small item, in fact it might amount to several hundred dollars. If there is a refusal to submit to such an examination, the right to sell stocks or bonds is at once forfeited. No other inspection law has any such provision. The fees required to be paid are not based upon the amount of stock that it is proposed to sell, but are based upon the assets of the investment company.

Section Fourteen of the Act which has already been referred to, make it unlawful for any investment company or dealer to issue, circulate or deliver any advertisements, pamphlets, circulars, prospectus or other documents in regard to its stocks, bonds, contracts or other securities in the State of South Dakota, differing in any way from the

copy filed with said commission, nor until the same has been approved by the Commission. Was there ever any inspection law that contained any such provision as the provision contained in that section? The right to advertise, the right to contract, the right to transact business is made dependable upon the arbitrary will of what must of necessity be an omnipotent commission.

We expected that it would be urged that this act might be called the act of licensing a business or occupation, for there is some intimation in the Act that it applies to the engaging in the business of selling stocks, bonds, etc. Section Four of the Act answers any such argument, for it applies to every sale or subscription, etc., unless within the excepted provisions.

The Attorney General suggests that the statute be declared severable, and that the court sustain certain provisions, although it finds other provisions unconstitutional. If the learned Attorney General had pointed out to this Court what provisions of the Act should be sustained, and what provisions of the Act should be eliminated, then there would be some force in his argument. We have endeavored to analyze the law with care, and all the provisions are so interwoven and involved, that it is absolutely impossible to separate any of the provisions from the law, and sustain such separate provisions as a valid act. The law must either stand or fall in its entirety.

CONCLUSION.

The constitutional guarantees of a free government judicially construed and interpreted by this great court, are the only safeguards against hasty and unwise legislation. By five decisions of lower Federal Courts, property and personal rights have been protected against the assault of state legislators on our constitutional rights. We cannot but feel that this Court will simply reiterate the principle already established by it, that a state cannot under the guise of police regulations, seek to overthrow every constitutional guarantee, and thus deprive a person of his liberty and property.

For the reasons herein expressed we confidently ask that the action of the lower court be affirmed.

Respectfully submitted,

GEORGE J. DANFORTH,
HUGH S. GAMBLE,
FRANK McLAUGHLIN,
Attorneys for Appellees.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 386.

CLARENCE C. CALDWELL, AS ATTORNEY GENERAL, ETC., APPELLANT,

vs.

THE SIOUX FALLS STOCK YARDS COMPANY ET AL., APPELLEES.

No. 413.

FRANK W. MERRICK ET AL., APPELLANTS,

vs.

N. W. HALSEY & COMPANY ET AL.

SUGGESTION THAT SOUTH DAKOTA & MICHIGAN "BLUE SKY" CASES BE HEARD IMMEDIATELY AFTER OHIO CASES.

Comes now the counsel for appellees in case of Clarence C. Caldwell, as Attorney General, etc., Appellant, *vs.* The

Sioux Falls Stock Yards Company, No. 386, and represents to the court that there is now pending upon the call of the court, awaiting argument, the following cases, to wit:

No. 438.

HARRY T. HALL, *Superintendent of Banks and Banking of the State of Ohio, Appellant,*

vs.

THE GEIGER-JONES COMPANY.

No. 439.

HARRY T. HALL, *Superintendent of Banks and Banking of the State of Ohio, Appellant,*

vs.

DON C. COULTRAP.

No. 440.

HARRY T. HALL, *Superintendent of Banks and Banking of the State of Ohio, Appellant,*

vs.

WILLIAM R. ROSE et al.

These cases involve the constitutionality of the so-called "Blue-Sky" Law of the State of Ohio.

That following said Ohio cases upon said call are the following cases, to wit, Nos. 212, 372, 340, 341, and 452, involving questions in no manner connected with the questions involved in the Ohio appeals hereinbefore mentioned.

That following the last-named cases upon the call are cases Nos. 386 and 413, involving the constitutionality of the South Dakota and Michigan so-called "Blue-Sky" Laws. That certain underlying principles to be presented in argument are common to the Ohio cases, South Dakota case, and Michigan case, although the acts differ in detail and in some substantial points. That it will be to the advantage

of both court and counsel if the Ohio, South Dakota, and Michigan cases be presented in consecutive order, and that by so doing all cases will be presented to the court in the most helpful and effective manner. Two counsel for certain of the appellees in the Michigan case, Mr. Wickersham and Mr. Reed, have filed a brief on behalf of the Investment Bankers Association of America as *amicus curiæ* in the Ohio cases. They concur in this suggestion.

These cases pending on the call, application was made in open court this morning and the court directed that this suggestion be put in printed form.

Counsel therefore respectfully suggest to the court that the South Dakota and Michigan cases, numbered respectively 386 and 413, be advanced upon the call so as to be heard in argument in their consecutive order immediately following cases Nos. 438, 439, and 440, being the Ohio cases hereinbefore referred to.

Respectfully submitted,

GEORGE J. DANFORTH,
Counsel for Appellees in Case No. 386.

October 11, 1916.